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Expert Testimony in Obscenity Cases

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COMMENTS

EXPERT TESTIMONY IN OBSCENITY CASES

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EXPERT testimony is a common and significant form of evidence in obscenity cases, although it is difficult to generalize upon its use since there is a wide divergence among courts as to the extent to which such testimony is admissible and necessary. It is the purpose of this comment to examine the proper role for the expert in obscenity cases. The conception of "obscenity" defines that role since it determines that to which the expert may testify. The first task, then, is to draw some conclusion as to what "obscenity" connotes in terms of substantive law.[1]

ROTH AND ITS RAMIFICATIONS

The United States Supreme Court in *Roth v. United States*[2] held that obscenity is not constitutionally protected expression. By salvaging and integrating past statements bearing on the topic the Court formulated a new test for determining if challenged material is actually obscene: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[3] Any apparent clarity or simplicity is deceptive: the test is riddled with ambiguity and hidden meaning. Its significance is revealed only by considering the elements and other

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[1] The word "obscenity" has never had a precise or generally accepted definition legally, as every case and comment regarding it indicates. See, *e.g.*, Roth v. United States, 354 U.S. 476, 491 (1957). See generally, Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40 (1938); Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).

[2] 354 U.S. 476 (1957). This was actually two cases consolidated, the second being *Alberts v. California*. Each tested the constitutionality of an anti-obscenity statute: *Roth* that of 18 U.S.C. § 1461 (1948); *Alberts* that of CAL. PEN. CODE § 311.

[3] 354 U.S. at 489. See MODEL PENAL CODE § 251.4 (Proposed Official Draft, 1962) (formerly § 207.10 of Tent. Draft No. 6, 1957) where a similar definition of obscenity is given: "Obscene defined . . . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . ." See generally Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963). CAL. PEN. CODE § 311 also similarly defines obscenity. This is discussed in Baum, *California's New Law on Obscene Matter*, 36 CALIF. S.B.J. 625 (1961); *Selected 1960-1961 California Legislation*, 36 CALIF. S.B.J. 643, 795 (1961); Wilson, *California's New Obscenity Statute: The Meaning of "Obscene" and the Problem of Scienter*, 36 So. CAL. L. REV. 513, 523 (1963).

language of the *Roth* case, against the background of earlier cases and statements on obscenity and through the perspective afforded by the post-*Roth* decisions.[4]

"Whether to the Average Person the Dominant Theme of the Material Taken as a Whole Appeals to Prurient Interest"

This portion of the *Roth* test imports first, that the appeal (or effect) of the material must be measured with reference not to the most susceptible possible recipient, but rather with reference to the person with normal sex instincts.[5] This requirement has been adjusted recently to cover cases where the material is directed at a deviate or juvenile audience; the reference is now to the average person in the "intended and probable recipient group."[6]

Secondly, the "dominant theme of the material taken as a whole" must be considered. Courts, therefore, are not at liberty to determine

[4] See generally, Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). This is generally regarded as the leading legal article in the field of obscenity.

The *Roth* case can be said to be a general re-affirmation of a stance in opposition to the *Hicklin* test, which was: "[W]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The Queen v. Hicklin, [1868] 3 Q.B. 360. As originally accepted in the United States, it was interpreted to stand for three propositions: the material's effect could be determined with reference to the most susceptible possible recipient, the effect of any isolated passage or portion could be the basis of determination, and the social worth of the material had no bearing whatever on the question of obscenity. See United States v. Kennerley, 209 Fed. 119 (S.D.N.Y. 1913). With the decline of the moralistic influence of Anthony Comstock, the test fell into disrepute and was abandoned in the 1930's. See Alpert, *supra* note 1, at 65. To appreciate its erosion chronologically, see United States v. Dennett, 39 F.2d 564 (2d Cir. 1930); United States v. One Book Called "Ulysses," 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom.* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934); United States v. Levine, 83 F.2d 156 (2d Cir. 1936).

[5] See United States v. One Book Called "Ulysses," *supra* note 4, at 184.

[6] Mishkin v. New York, 383 U.S. 502, 508-509 (1966). Lockhart & McClure, *supra* note 4, at 68, formulate and expound the "variable obscenity concept" which is what the court in *Mishkin* appears to have adopted, *i.e.* a determination based upon the appeal to (or effect on) the average member of the particular audience to which the material is directed.

Notice that this approach allows distribution to doctors, educators, and scientists of material which might be held obscene if distributed to the average man, and distribution to an average man of material which might be held obscene if distributed to a child. See United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957). *Cf.* People v. Marler, 199 Cal. App. 2d Supp. 889, 18 Cal. Rptr. 923 (App. Dep't Super. Ct. San Bernardino, 1962). It is highly probable, then, that no special statutes are necessary to protect children, since the *Mishkin* rationale provides an automatic gauge. Some, however, have suggested methods more directly aimed at protecting youth. See, *e.g.*, Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 SO. CAL. L. REV. 345 (1966); Note, 54 GEO. L.J. 1379 (1966), for discussion of the advantages of this approach and the problems involved.

the appeal (or effect) of the material by limiting their consideration to isolated passages or portions, but are obligated to find that the objectionable parts are of such quantity or nature as to flavor the whole.[7]

Third, and most importantly, the material must appeal to prurient interest.[8] The Court borrowed the phrase from the Model Penal Code, wherein it is defined as a "shameful or morbid interest in nudity, sex, or excretion...."[9] Although, in the Model Penal Code the American Law Institute expressly rejected the definitions of obscenity developed by case law,[10] the Supreme Court could perceive "no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code...."[11] The Court proceeded to approve the case law definitions given in the instructions by the trial courts in the respective cases: in *Alberts* that the material "has a substantial tendency to deprave or corrupt its readers" and in *Roth* that it "has a tendency to excite lustful thoughts."[12] Analyzing these facts, Lockhart and McClure, the leading legal writers in the field, conclude that the Court may consider any of the three definitions constitutionally acceptable.[13] It is true, however, that there is a strong tendency of courts, at least nominally, to accept the Model Penal Code definition.

"Applying Contemporary Community Standards"

Judge Learned Hand in *United States v. Kennerley*[14] made reference to obscenity as the "present critical point in the compromise between candor and shame at which the community may have arrived here and now."[15] The Court in *Roth* by requiring application of contemporary community standards was restating Hand's basic notion that material which is generally tolerated by the people in the com-

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[7] See, *e.g.*, Maryland State Bd. of Motion Picture Censors v. Times Film Corp., 212 Md. 454, 129 A.2d 833 (1957). Courts occasionally recognize that the "dominant theme of the material taken as a whole" has different implications with regard to the medium of expression. See, *e.g.*, Freedman v. Maryland, 380 U.S. 51 (1964); Landau v. Fording, 245 A.C.A. 872, 54 Cal. Rptr. 177 (1966).

[8] See generally, Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961).

In addition to the appearance of the phrase in the *Roth* test itself the Court also stated: "[S]ex and obscenity are not synonomous. Obscene material is material which deals with sex in a manner appealing to prurient interest." Roth v. United States, 354 U.S. 476, 487 (1957).

[9] MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957).

[10] MODEL PENAL CODE § 207.10, comment 6(a) (Tent. Draft No. 6, 1957).

[11] 354 U.S. at 487 n.20.

[12] 354 U.S. at 486-90. In his separate opinion Mr. Justice Harlan points to the fact that the majority in *Roth* was actually approving very different definitions. *Id.* at 496-500.

[13] Lockhart & McClure, *supra* note 4, at 56-58.

[14] 209 Fed. 119 (S.D.N.Y. 1913).

[15] *Id.* at 121.

munity is not obscene. Stated differently in later cases, obscene material must exceed "the customary limits of candor;"[16] it must exhibit "patent offensiveness."[17] In *Manual Enterprises, Inc. v. Day*,[18] Mr. Justice Harlan indicated that the determination that the material affronts contemporary community standards of decency is a separate constitutional prerequisite to the conclusion that it is obscene.[19]

There has been much controversy as to whether the community referred to is a local or national one.[20] It has been argued that the standard is similar to that of the reasonable man in negligence cases and exists without regard to any geographical area.[21] Some cases have held that the relevant community is the state;[22] a smaller minority that it is the city.[23] Most courts, however, have chosen the national community as the standard,[24] thus following the opinion of Mr. Justice Harlan in *Manual Enterprises*, and that of Mr. Justice Brennan in *Jacobellis v. Ohio*[25]—neither of which was a majority opinion.[26]

"Utterly Without Redeeming Social Importance"

Apart from the elements of the *Roth* formula *per se*, the Court in *Roth* indicated that social importance would continue to play a role in the determination of obscenity,[27] but did so ambiguously. The controversy has centered around whether social importance should merely

[16] Jacobellis v. Ohio, 378 U.S. 184, 191 (1964).

[17] Manual Enterprises, Inc. v. Day, 370 U.S. 478, 482 (1962).

[18] 370 U.S. 478 (1962).

[19] *Id.* at 482.

[20] *Compare* the principal opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964), *with* the dissenting opinion of Warren, C.J., *id.* at 199.

[21] See generally, Seaton, *Obscenity: The Search for a Standard*, 13 KAN. L. REV. 117 (1964).

[22] See, *e.g.*, McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 121 N.W.2d 545 (1963); Annot., 5 A.L.R.3d 1140, 1182-86 (1966).

[23] See, *e.g.*, Gent v. State, 393 S.W.2d 219 (Ark. 1965), *prob. juris. noted as to part, cert. denied as to part*, 384 U.S. 937 (1966); Note, 20 ARK. L. REV. 178 (1966).

[24] See, *e.g.*, State v. Hudson County News Co., 41 N.J. 147, 196 A.2d 225 (1963); Excellent Publications, Inc. v. United States, 309 F.2d 362 (1st Cir. 1962) (dictum).

[25] 378 U.S. 184 (1964).

[26] Moreover, Justice Harlan's reasoning in the *Manual Enterprises* case, that one who violates the federal anti-obscenity statutes might be tried anywhere in the nation and therefore a national standard should be used, is no reason for requiring states to do so, since the trial will be within the state.

The California statute (CAL. PEN. CODE § 311) buries the problem by deleting the word "community." This tactic implicitly recognizes the elusiveness of "contemporary community standards," but achieves no real advantage.

[27] It was stated: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." (Footnote omitted.) 354 U.S. at 484.

be weighed along with the other elements of the test, or whether it should be an independently applied constitutional criterion. The ambiguous reference in *Roth* can easily be interpreted to support either of those viewpoints.[28] While definitive settlement remains for the Court, "probabilistic importance"[29] is given to the opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Fortas, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,[30] in which it was stated: "Each of the . . . constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness."[31]

The Ginzburg Gloss

In *Ginzburg v. United States*,[32] a majority of the Supreme Court seemed to suggest that even though the content of the material might not be obscene under the *Roth* test, a conviction for the violation of an obscenity statute could be upheld where the evidence showed that the defendant had economically exploited, or "pandered," the material by putting sole emphasis on the sexually provocative aspects.[33] The

[28] *E.g.*, compare the respective opinions of the Justices in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

[29] See *Church-State—Religious Institutions and Values: A Legal Survey, 1964-66*, 41 NOTRE DAME LAW. 681, 776 (1966).

[30] 383 U.S. 413 (1966).

[31] *Id.* at 419. (Footnote omitted.) This was established as the rule in California in the case of Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P.2d 152, *cert. denied*, 375 U.S. 957 (1963).

Courts have yet to consider the question whether the very fact that the material appeals to prurient interest might give that material social importance. This will become a very real problem if it is shown that the partaking of obscene matter provides an outlet for drives which would otherwise result in some sort of asocial conduct—such as sex crimes. Douglas, J., suggested this possibility in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 432 (1966) (concurring opinion) when he stated: "[O]ne might guess that literature of the most pornographic sort would . . . provide a substitute—not a stimulus—for anti-social sexual conduct." See generally, Murphy, *The Value of Pornography*, 10 WAYNE L. REV. 655, 661 (1964).

[32] 383 U.S. 463 (1966). The *Ginzburg* decision is noted in 19 STAN. L. REV. 167 (1966); 44 TEX. L. REV. 1382 (1966).

[33] *Id.* at 470. See MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957): "Alternative (1) Pandering to Interest in Obscenity Prohibited. . . . Pandering means exploiting such an interest primarily for pecuniary gain, knowing that the interest exploited is an interest in obscenity for its own sake . . . ." Undoubtedly, the Court drew upon this language for the holding in *Ginzburg*. The Model Penal Code discarded this provision as an alternative basis in the 1962 Proposed Official Draft, but reaches the same result by providing in § 251.4(2)(e) that one who "sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene," is guilty of a misdemeanor. CAL. PEN. CODE § 311.5 prohibits the advertisement of material held out to be obscene.

Perhaps this may be considered as another dimension within the framework of Lock-

Court seems to speak estoppel without saying it; that is, it refuses to recognize the defendant's contention that the content of the material which he represented as obscene (by means of advertisements designed to "catch the prurient")[34] is actually not.[35]

It has been suggested that the pandering basis of determining guilt in a criminal obscenity case may become the tail that wags the dog.[36] To the degree that it does, the prime consideration of this comment, *i.e.* expert testimony in obscenity cases, will be of decreased significance since the court will shift its inquiry from the nature of the content of the material to the facts of the defendant's conduct. However, the Court in *Ginzburg* expressly limited the application of the pandering basis of guilt to "close cases,"[37] and so long as this limitation remains expert testimony will continue to be appropriate to establish that there is a close case. It is highly improbable that the Court will extend the application beyond close cases, since to do so would be to accomplish a substantial piece of legislation.[38]

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hart and McClure's "variable obscenity concept"—that is, variable with regard to the defendant's conduct. See note 6 *supra.*

[34] 383 U.S. at 473. Here the Court is quoting with approval from the opinion of Learned Hand in United States v. Rebhuhn, 109 F.2d 512, 514 (2d Cir. 1940).

[35] 383 U.S. at 472. Here it was stated that "The court could accept [the panderer's] evaluation at face value."

[36] See *Church-State—Religious Institutions and Values: A Legal Survey—1964-66,* 41 NOTRE DAME LAW. 681, 771 (1966). The contrary conclusion is suggested in Ablard, *Obscenity, Advertising, and Publishing: The Impact of Ginzburg and Mishkin,* 41 GEO. WASH. L. REV. 85 (1966).

[37] 383 U.S. at 474. A "close case" is one in which the material which is represented as obscene is at least borderline; that is, if it does not appeal to prurient interest, exceed contemporary community standards, or lack social importance, it comes very close to doing so with respect to the element or elements that it does not meet.

[38] It is believed that the Court in *Ginzburg* has cautiously and commendably pointed the way to a new means of regulating objectionable materials. Although the Court in *Ginzburg* justifiably accomplished some judicial legislation, any further extension of this approach should come from the legislative rather than the judicial branch of government.

It was stated in *Ginzburg* that "A conviction . . . explained in part by the presence of this [pandering] element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." 383 U.S. at 475. This approach, then, does not permit wholesale censorship; in fact, it assures the minimum infringement on freedom of expression while allowing society its right to control morality by regulating conduct regarded as detrimental to its interests. The fact that emphasis is put on the defendant's conduct rather than on the content of the material tends to bring obscenity law into line with other criminal law, and recognizes, as did Mr. Chief Justice Warren in his concurring opinion in *Roth,* that "It is not the book on trial, it is the person." 354 U.S. 476, 495 (1957).

The *Ginzburg* rationale presents two especially interesting suggestions. First, although the Court refused to apply the pandering basis to other than "close cases," because it seems evident that convictions based on pandering do not infringe on free speech, legislatures could extend the rationale to cover any case where the defendant by his conduct, *i.e.* advertising methods, appeals to prurient interest. Practically speaking, of course,

THE EXPERT

Now that some foundation in the substantive law of obscenity has been established—however much it may rest upon quicksand—the expert's proper place and purpose in obscenity cases may be considered.

The vagueness of "obscenity" is fully recognized, both as a prescriptive standard for criminal conduct and as definitive of expression which is not constitutionally protected.[39] The opposite results reached in different courts as to the obscenity of the very same material testify to this vagueness.[40] Like Justice Stewart, everyone knows it when he sees it.[41] However, each person, having a different perspective, sees it in a different place. The Supreme Court, however, has unequivocally held that the vagueness of "obscenity" is constitutionally tolerable.[42] It is not the purpose of this comment to attempt to assail that holding. Rather, within the bounds of that holding, the expert will be presented as one who has the potential of reducing the admitted vagueness by providing evidence which bears upon whether or not the challenged material is obscene according to an accurate application of the elements of the obscenity test.

Basis for Allowing Expert Testimony in Obscenity Cases

As a matter of common law, parties are entitled to call upon expert witnesses to testify in a proper case.[43] Statutes also often authorize

where the defendant has represented material as obscene in his advertisements of it, that material will usually suffice to make a close case. The advantage to be gained by a statute punishing simple pandering of obscene material is that there would be no need to prove the close case. Second, the present undesirable and burdensome procedural difficulties involved in obscenity cases which are determined by application of the *Roth* test to the content of the material may be overcome. There have been two main difficulties in this respect, both of which stem from the problem that the question of the obscene nature of the material's content is held to be a mixed question of law and fact, or a "constitutional-fact question." This holding means that: (a) the judge of the trial court is required to make an independent finding and dismiss the case if he concludes that the material is not obscene regardless of what the jury might find; and (b) on appeal review *de novo* is required. See 5 A.L.R.3d 1158, 1190-94 (1966), and cases cited therein.

It is believed that preservation of morality is the basic motivation behind anti-obscenity laws (even though it is not a proven result). Therefore, a commendable quality of the *Ginzburg* approach is that it is particularly aimed to insulate those who are not already aware of how and where to obtain the potentially corrupting material, *i.e.* those who are most likely to have morals remaining to protect.

[39] Roth v. United States, 354 U.S. 476, 491 (1957).

[40] *Compare* Attorney General v. The Book Named "Tropic of Cancer," 345 Mass. 11, 184 N.E.2d 328 (1962) (Tropic of Cancer not obscene), *with* People v. Fritch, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 192 N.E.2d 713 (1963) (Tropic of Cancer obscene).

[41] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion).

[42] 354 U.S. 476, 491. The Court stated that this "lack of precision is not itself offensive to requirements of due process."

[43] See generally, McCormick, Evidence, §§ 11-17 (1954). 7 Wigmore, Evidence §§ 1917-29 (3d ed. 1943); Witkin, California Evidence, §§ 406-439 (2d ed. 1966).

the use of expert testimony.[44] The Model Penal Code specifically provides, "Expert testimony . . . relating to factors entering into the determination of the issue of obscenity, shall be admissible."[45]

Mr. Justice Frankfurter, concurring in *Smith v. California*,[46] maintained that whether it is a judge or jury hearing the case, he "would make the right to introduce such evidence [expert testimony] a requirement of due process in obscenity prosecutions."[47] The other extreme is illustrated by Judge Learned Hand's position, that in each case it should be the jury which establishes the standard and moreover that it is "especially the organ with which to feel the content . . ."[48] of allegedly obscene material. It is now generally agreed that an expert's testimony upon a matter is not an "usurpation of the function of the jury," because such testimony is merely evidence which the juror is to weigh along with other evidence, *i.e.* the expert's testimony is not and should not be conclusively binding.[49] Recognizing this fact, there is ample room for both Frankfurter's view that expert testimony should be admitted upon the factors of determination, and Hand's view that the jury should ultimately decide whether material is or is not obscene.

In accordance with the general rules of evidence, expert testimony should be admitted in obscenity cases where the two recognized prerequisites are met: a proper subject and a qualified witness.[50] The test is: "Can a jury from this person receive appreciable help . . ."[51] which "will probably aid [it] . . . in its search for the truth?"[52]

At the threshold of consideration of proper subjects for expert testimony in obscenity cases, it is to be conceded that an expert should never be asked directly, "Is this matter obscene?"[53] The former ra-

[44] See, *e.g.*, CAL. EVIDENCE CODE §§ 720-23. *Cf.*, FED. R. CRIM. P. 28. Many statutes, moreover, authorize the court, on its own prerogative, to call an expert witness. See, *e.g.*, CAL. EVIDENCE CODE §§ 730-33. This last procedure is understandably more conducive to obtaining unbiased experts, and if utilized could therefore solve one of the recurring problems of expert testimony.

[45] MODEL PENAL CODE, § 251.4(4) (Proposed Official Draft, 1962).

[46] 361 U.S. 147, 160 (1959).

[47] *Id.* at 167.

[48] United States v. Kennerley, 209 Fed. 119, 121 (S.D.N.Y. 1913).

[49] See 7 WIGMORE, EVIDENCE § 1920 (3d ed. 1940). This rule is frequently stated in obscenity cases. See, *e.g.*, United States v. West Coast News Co., 357 F.2d 855, 859-60 (6th Cir. 1966).

[50] See 7 WIGMORE, EVIDENCE § 1920 (3d ed. 1940).

[51] People v. Williamson, 207 Cal. App. 2d 839, 847, 24 Cal. Rptr. 734, 739 (1962), *cert. denied*, 377 U.S. 994, *rehearing denied*, 379 U.S. 871 (1964). In this obscenity case the California court stated it was adopting Wigmore's criteria and cited 7 WIGMORE, EVIDENCE § 1923 (3d ed. 1940).

[52] State v. Killeen, 79 N.H. 201, 107 Atl. 601 (1919). Cited with approval in 7 WIGMORE, EVIDENCE § 1923, at 22 (3d ed. 1940).

[53] See, *e.g.*, United States v. West Coast News Co., 357 F.2d 855, 859 (6th Cir. 1966).

tionale was that this is the ultimate question and to allow an expert to testify upon it would be an invasion of the province of the jury.[54] This strict rule is now generally rejected,[55] but McCormick states there is a distinction to be made between questions "merely call[ing] for an opinion as to an ultimate fact . . . and those which have the additional feature that they are expressed in terms of some legal standard . . . ."[56] Obscenity is in this respect similar to negligence; it is a conclusion which is expressed in terms of a legal standard, aptly called by McCormick a "legal conclusion."[57] Expert testimony is not proper as to this type of ultimate question. The fact that there is no expert in determining obscene matter is a second important reason for excluding expert testimony on the question.

Potential subjects for expert testimony in obscenity cases are determined by the elements of the obscenity test. The Supreme Court has done little to enlighten lower courts as to which of these elements expert testimony might be proper.[58]

"Whether to the Average Person the Dominant Theme of the Material Taken as a Whole Appeals to Prurient Interest"

The "dominant theme of the material taken as a whole" means that the objectionable parts must be of such quantity or nature as to flavor the whole.[59] The producer's purpose is not equivalent to the dominant theme. The former is irrelevant on the question of whether or not, as a fact, the content of the material is obscene.[60] The dominant

[54] See Note, 12 DE PAUL L. REV. 337, 339 (1966).

[55] *Id.* at 339-40.

[56] MCCORMICK, EVIDENCE § 12, at 27 (1954).

[57] *Id.* at 28. See Note, 1965 WIS. L. REV. 113.

[58] Statements coming from the Supreme Court which more than passively take notice of the fact that expert testimony was or was not admitted are limited to Justice Frankfurter's concurring opinion in Smith v. California, 361 U.S. 147, 160 (1959), (see note 46 *supra* and accompanying text), and that of Justice Harlan, concurring in part and dissenting in part, in Smith v. California, *supra* at 169, where he stated that he thought it would be a denial of due process to exclude all evidence bearing on contemporary community standards, but that it would not be a denial of due process to exclude only expert testimony. As the court in United States v. West Coast News Co., 228 F. Supp. 171, 183 (W.D. Mich. 1964), *aff'd*, 357 F.2d 855 (6th Cir. 1966) recognized: "The cases which have discussed the issue of expert witnesses in obscenity cases present at best a dim beacon for . . . guidance."

[59] See note 7 *supra* and accompanying text.

[60] See United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934).

The purpose of the *purveyor* is an entirely different consideration from the purpose of the *producer*. The Supreme Court held in Smith v. California, 361 U.S. 147 (1959), that the purveyor must have scienter of the nature of the material, but the exact definition of this requirement has yet to be made clear. And under the *Ginzburg* basis of conviction the purveyor's purpose as revealed by his conduct has a direct bearing on his guilt. It is, however, the producer's purpose being discussed in the text, and it is without relevance on the obscene nature of the content of the material, except as it manifests itself in the finished product.

theme imports an aspect of the final product. As so defined it would be a proper subject for expert testimony since there are qualified experts in the various media who can give jurors appreciable aid in determining the dominant theme of a particular work. The courts, however, seldom so articulate this issue, probably for the reason that it is implicitly determined by the expert's testifying to the work's social importance.

While there is a discernible trend toward allowing testimony of qualified experts as to the material's appeal to prurient interest, there is a lack of consensus in the reasoning of the federal[61] and state[62] courts. This lack of uniformity indicates basic confusion.

In order to determine whether or not expert testimony should be admitted on the issue of appeal to prurient interest, that concept must be carefully analyzed. As mentioned above, the Court in *Roth* was unable to distinguish between the Model Penal Code's requirement that the material have a certain *appeal*, and the case law definitions

[61] See United States v. Klaw, 350 F.2d 155 (2d Cir. 1965) (expert testimony necessary to establish prurient appeal to deviates; autoptical evidence insufficient); Volanski v. United States, 246 F.2d 842 (6th Cir. 1957) (expert testimony concerning effect on juveniles and deviates error; average man is standard); Parmelee v. United States, 113 F.2d 729, 732 (D.C. Cir. 1940) (dictum) (psychologists' testimony desirable if not necessary); United States v. 392 Copies of a Magazine Entitled "Exclusive," 253 F. Supp. 485 (D. Md. 1966) (expert testimony desirable or necessary where deviates involved; where average man only necessary if material is "esoteric," not if "elemental"); United States v. One Carton Positive Motion Picture Film Entitled "491," 247 F. Supp. 450 (S.D.N.Y. 1965) (expert testimony necessary concerning prurient appeal to average man —in civil and criminal cases); United States v. West Coast News Co., 228 F. Supp. 171 (W.D. Mich. 1964) (approved exclusion of expert testimony on ultimate issue of obscenity; ignored exclusion on appeal to prurient interest). In United States v. Davis, 353 F.2d 614 (2d Cir. 1965), *cert. denied*, 384 U.S. 953 (1966), Waterman, J., dissenting, stated that he did not feel that the verdict could be sustained without expert testimony on the issue of appeal to prurient interest.

[62] See State v. Onorato, 3 Conn. Cir. 438, 216 A.2d 859 (1965) (dictum) (expert testimony admissible but not required on appeal to prurient interest). State v. Scope, 46 Del. 519, 86 A.2d 154 (Super. Ct. 1952) (psychologist could testify concerning effect on subconscious; should not concerning effect on conscious). Trans-Lux Distrib. Corp. v. State Bd. of Censors, 240 Md. 98, 213 A.2d 235 (1965) (burden of proof not sustained because no expert testimony on appeal to prurient interest); *accord*, Dunn v. State Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965). Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962) (disallowance of expert testimony on lack of prurient appeal is error); *accord*, Levine v. Moreland, 229 Md. 231, 182 A.2d 484 (1962) (dictum). State v. Jungclaus, 176 Neb. 641, 126 N.W.2d 858 (1964) (expert testimony on appeal to prurient interest admissible); G. P. Putnam's Sons v. Calissi, 86 N.J. Super. 82, 205 A.2d 913 (Ch. 1964) (judge arbitrarily stated prurient appeal not subject to documentary evidence). State *ex rel.* Beil v. Mahoning Valley Distrib. Agency, Inc., 116 Ohio App. 57, 186 N.E.2d 631 (1962) (witnesses must qualify as experts to testify concerning prurient appeal). City of Cincinatti v. King, 107 Ohio App. 453, 8 Ohio Op. 2d 82, 159 N.E.2d 767 (1958) (expert testimony on appeal to prurient interest of average man sufficient to sustain conviction).

calling for a certain *effect*. The confusion injected thereby has been perpetuated by similar indiscriminate use of language by lower courts. Thus, while nearly all post-*Roth* cases verbally accept the definition requiring an appeal to "a morbid or shameful interest in nudity, sex or excretion," they continue to speak also of "corrupting or depraving morals," and "exciting lustful thoughts." Because appeal to prurient interest is the primary issue in obscenity cases,[63] and since any one definition of it is vague enough standing alone, courts are to be encouraged to make clear their choice or choices of definition, and to be discouraged from confusing the definitions and thereby compounding the problems.

It is assumed that courts generally intend to apply the Model Penal Code definition affirmatively set forth in *Roth* since nearly all adopt it verbally. The question then is whether or not the subject of the material's appeal to a morbid or shameful interest in nudity, sex or excretion is a proper one on which to admit expert testimony. The Model Penal Code has attempted to clarify the requirement that the material appeal to a morbid and shameful interest in nudity, sex or excretion. Implicitly recognizing that there may exist a legitimate interest as well as a morbid or shameful interest in nudity, sex or excretion,[64] it provided that "the guilt-pleasure concept . . . is central to [the] . . . definition of prurient interest."[65] While "guilt-pleasure concept" may leave something to be desired, it provides the best analytical tool yet proposed for determining whether or not there is an appeal to prurient interest.

Distinction should be made between cases involving an intended and probable recipient group of average persons and cases involving an intended and probable recipient group of deviates or juveniles, since it is to be expected that the type of material which will appeal to the prurient interest of the average member of each such group will differ. But it is submitted that in either case expert testimony should be admissible.

If the target group is one of persons having average sex instincts, it has been argued that the jury assessment of the material's appeal to prurient interest should be made without expert aid, since the jury is as capable as any expert of recognizing a morbid or shameful interest in nudity, sex or excretion which would cause the guilt-pleasure syndrome central to the Model Penal Code definition.[66] Deeper analysis,

[63] See Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961).

[64] See Note, 51 CORNELL L.Q. 785, 789 (1966).

[65] See MODEL PENAL CODE § 207.10, comment (d), at 32 (Tent. Draft No. 6, 1957). LaBarre, *Obscenity: An Anthropological Appraisal*, 20 LAW & CONTEMP. PROB. 533 (1955), is cited therein as support for this proposition.

[66] See Note, 51 CORNELL L.Q. 785, 789 (1966).

however, points to the fact that while laymen might be able to recognize a morbid or shameful interest in nudity, sex or excretion, and perhaps the guilt-pleasure syndrome, when they experience it, it is doubtful that they could identify any given material which would prompt such a manifestation without actually relying upon their own reaction to the material. And this basis of decision is to be avoided since considerable distortion will result from the facts that: (a) "no man can *qualify* as an 'average man,' "[67] (b) the appeal of the material to the juror while he is in court is bound to differ greatly from its appeal to him under ordinary circumstances of observation;[68] and (c) there is gross variation in the appeal of any given material based upon the sex of the observer,[69] and thus jurors of one sex have no foundation whatever on which to determine the appeal of the questioned material to members of the other sex. These considerations should cause doubt as to the propriety of the suggestion that the juror alone is best able to determine if the material appeals to prurient interest, as it is defined by the Model Penal Code, and accepted in *Roth*. They strongly suggest the need for expert testimony by one who has studied and has knowledge of the reactions of average persons to various types of material.

The argument in favor of admitting qualified expert testimony in cases involving intended and probable recipient groups composed of deviates or juveniles is even more compelling.[70] Certainly no ordinary juror has either a reactional or intellectual basis for determining what sort of material appeals to the prurient interest—that is, a morbid or shameful interest in nudity, sex or excretion—of non-average persons, which would cause these persons to experience the guilt-pleasure syndrome. Therefore, since jurors have no basis whatever for this determination, expert testimony would be essential to provide them with a basis.[71]

[67] State v. Hudson County News Co., 41 N.J. 247, 263 n.9, 196 A.2d 225, 233 n.9 (1963). (Emphasis in original.)

[68] See Clark, *The Projective Measurement of Experimentally Induced Levels of Sexual Motivation*, 12 J. EXP. PSYCHOLOGY 44 (1954). Clark's studies indicate there is a gross difference in response to material based upon the extent to which the recipient encounters the material in a guilt-free situation.

[69] See Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and Empirical Evidence*, 46 MINN. L. REV. 1009 (1962), and the studies cited therein.

[70] See United States v. Klaw, 350 F.2d 155 (2d Cir. 1965).

[71] If instead of, or in addition to, the Model Penal Code definition, the court should adopt one or both of the approved case law definitions, proper admission of expert testimony similarly revolves around the criteria of a proper subject and a qualified witness. Whether or not the material has a substantial tendency to deprave or corrupt morals might be a proper subject for expert testimony, except for the fatal fact that there are no experts, since there is no empirical evidence which shows that the reading or observation of obscene material causes any "deleterious influence on the character which in turn manifests in behavior,"—the very reason (and a good one) for the Model Penal Code's

In an obscenity case where the basis for prosecution is that set forth in the recent *Ginzburg* decision, the expert's place has yet to be defined by any court. As mentioned above, his importance will depend upon whether close cases remain the breadth of the application of the pandering rationale. Should the close case limitation remain, expert testimony will continue to be important on the issues of contemporary community standards and redeeming social importance to establish the existence or absence of a close case. Should the close case limitation be removed by decision or statute, expert testimony on these issues will not be relevant. Upon the issue of appeal to prurient interest of the content of the material, the admissibility of expert testimony will similarly depend on whether or not the close case limitation remains. However, anytime the *Ginzburg* rationale is applied, whether it is applied only in close cases or is extended to all cases, the court will be concerned with whether the defendant's conduct—his pandering—is making an appeal to the prurient interest of the average member of the intended and probable recipient group. The psychological expert's testimony, it seems, would be as useful here as it is with respect to determining the nature of the content of the material.[72] The only notable differences appear to be: (a) due to the context of the *Ginzburg*-type of case the prurient interest requirement is necessarily defined in terms of the recipient's shameful or morbid interest in nudity, sex or excretion; and (b) the hypothetical question must be utilized more often as a means of eliciting the expert's response since he will be dealing with facts of the defendant's conduct which he has not observed rather than material which he has observed or read.

Experts who could qualify to testify as to whether the material appeals to prurient interest as defined by the Model Penal Code would be limited to those psychiatrists and psychologists who have studied human reaction to various sorts of material. Their testimony should be given with reference to the appeal to prurient interest of the average members of the intended and probable group to which this particular material was directed.[73] Unless the expert has conducted—or is per-

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rejection of the definition. See MODEL PENAL CODE § 207.10, comment 6(a) (Tent. Draft No. 6, 1957).

The last possible alternative or additional definition approved in *Roth* was that the material have a tendency to excite lustful thoughts. It should suffice to say that while it is arguable that an average juror could make this determination as to an intended and probable recipient group of average persons by basing his determination upon his own reactions, such a reactional basis for decision suffers from the same three infirmities given in the text for opposing a reactional basis for deciding appeal to prurient interest as defined by the Model Penal Code. Where the target group is composed of deviates or juveniles, the jury would have no basis whatever to determine whether or not the material would excite their lustful thoughts, and therefore an expert would be imperative.

[72] *Cf.* People v. Sikora, 32 Ill. 2d 260, 204 N.E.2d 768 (1965) (evidence admissible to show appeal to prurient interest by advertisements).

[73] *Cf.*, Volanski v. United States, 246 F.2d 842 (6th Cir. 1957).

mitted to conduct—a study upon the very material in question, the court should be convinced of the similarity between that which was studied and that in question before allowing the expert to testify. While it may be argued that these qualification requirements limit the number of experts in any given case, such limitation is justified since unless these requirements are met, the expert, like the juror, will be without grounds for his opinion; his opinion would therefore be superfluous and likely to mislead the jury.

Evidence on the material's appeal to prurient interest is of necessity either autoptical, that is, presented for personal observation, or expert testimony.[74] As observed above the trier of fact is not competent to determine solely from autoptical evidence whether or not material appeals to prurient interest. Therefore, it should be held that there is insufficient evidence to support the verdict if the challenging party fails to bolster his position with expert testimony,[75] and error[76] or denial of due process[77] to refuse to allow the defendant's experts, if qualified, to testify as to the material's lack of appeal to prurient interest, except as the judge is authorized within his sound discretion to limit their number.

"Applying Contemporary Community Standards"

Without instructive advice from the Supreme Court, the lower courts have reached varying results regarding the expert's proper role in determining contemporary community standards. The older cases rejected expert testimony on this issue.[78] Recent federal cases reveal a tendency to permit qualified experts to give relevant testimony upon the issue of contemporary community standards,[79] as do most state court decisions.[80]

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[74] *Cf.*, United States v. Klaw, 350 F.2d 155 (2d Cir. 1965).

[75] See Trans-Lux Distrib. Corp. v. State Bd. of Censors, 240 Md. 98, 213 A.2d 235 (1965). *Cf.*, Freedman v. Maryland, 380 U.S. 51, 58 (1964), stating "the burden of proving that the film is unprotected expression must rest with the censor."

[76] See Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962).

[77] *Cf.*, Smith v. California, 361 U.S. 147, 160 (1959) (Frankfurter, J., concurring).

[78] See, *e.g.*, Drieser v. John Lane Co., 183 App. Div. 773, 171 N.Y. Supp. 605 (1918).

[79] See Kahm v. United States, 300 F.2d 78 (5th Cir.), *cert. denied*, 369 U.S. 859 (1962) (assumes expert testimony admissible on contemporary community standards, but not required). Womack v. United States, 294 F.2d 204 (D.C. Cir.), *cert. denied*, 365 U.S. 859 (1961) (testimony inadmissible unless witnesses qualified as experts on contemporary community standards). Alexander v. United States, 271 F.2d 140 (8th Cir. 1959) (expert testimony on contemporary community standards admissible, but not binding); *accord*, United States v. 392 Copies of a Magazine Entitled "Exclusive," 253 F. Supp. 485 (D. Md. 1966) (dictum). United States v. West Coast News Co., 228 F. Supp. 171 (W.D. Mich. 1964) (expert testimony rejected where expert's qualifications not established).

[80] Some state cases have indicated that it is a denial of due process to exclude expert

Turning to general principles, is the issue of what exceeds contemporary community standards a proper subject for expert testimony? The answer to this question has been complicated by confusion regarding the function of the jury in establishing contemporary community standards. In *United States v. Levine*,[81] Judge Learned Hand indicated that the jury should be treated as the embodiment of contemporary community standards by his statement that "the standard [fixed by the jury] . . . is likely to be an acceptable mesne . . . ."[82] However, the Supreme Court in *Roth* clearly indicated that the function of the jury is to determine rather than embody contemporary community standards by its explicit approval of the trial judge's instruction that the jurors "are the . . . judges of what the common conscience of the community is, and in determining that conscience [they] . . . are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."[83] Since the *Roth* case the question of the scope of the relevant community—local or national— has arisen, the majority of jurisdictions applying the standards of the national community, which is, of course, an abstraction based upon that geographical unit.[84]

In the determination of contemporary community standards, the trier of fact should consider all the evidence—including expert testimony—bearing on the issue. Some courts, however, have insisted that

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testimony on contemporary community standards, thus following Justice Frankfurter's concurring opinion in Smith v. California, 361 U.S. 147, 160 (1959). *In re* Harris, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305 (1961), *vacated and remanded on other grounds*, 374 U.S. 499 (1963); People v. Aday, 226 Cal. App. 520, 38 Cal. Rptr. 199, *cert. denied*, 379 U.S. 931 (1964). One recent California case stated that expert testimony on contemporary community standards is proper because it is a subject on which the judge has no special competence. Landau v. Fording, 245 A.C.A. 872, 54 Cal. Rptr. 177 (1966). Other cases have indicated that expert testimony on contemporary community standards is necessary to sustain the verdict. Leighton v. State Bd. of Censors, 242 Md. 705, 218 A.2d 179 (1966); Dunn v. State Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965). It has been held error for the trial court to exclude expert testimony on this issue. Trans-Lux Distrib. Corp. v. State Bd. of Censors, 240 Md. 98, 213 A.2d 235 (1965); Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962); Levine v. Moreland, 229 Md. 231, 182 A.2d 484 (1962); G. P. Putnam's Sons v. Calissi, 86 N.J. Super. 82, 205 A.2d 913 (Ch. 1964) (dictum). Other cases have admitted expert testimony on contemporary community standards, but have stated that such evidence would not be required to support a verdict. City of Chicago v. Kimmel, 31 Ill. 2d 202, 201 N.E.2d 386 (1964); City of Chicago v. Doe, 47 Ill. App. 2d 460, 197 N.E.2d 711 (1964); State v. Hudson County News Co., 41 N.J. 247, 196 A.2d 225 (1963) (dictum). A last group of cases, bucking the trend, have held it proper to exclude expert testimony on contemporary community standards. State v. Vollmar, 389 S.W.2d 20 (Mo. 1965); People v. Finkelstein, 11 N.Y.2d 300, 229 N.Y.S.2d 367, 183 N.E.2d 661 (1963).

[81] 83 F.2d 156 (2d Cir. 1936).

[82] *Id.* at 157.

[83] 354 U.S. at 490.

[84] See notes 20-26 *supra* and accompanying text.

the jurors consult only their own experience. That reasoning overlooks two facts: (a) that expertness is relative[85] and that some persons have greater familiarity with what the community tolerates and can enlighten the less informed jurors; and (b) that without any evidential basis for determining contemporary community standards, a juror will unconsciously be inclined mistakenly to think his own standards are those generally held by the community and proceed to impose his own standards rather than determine those of the community.[86] This approach of allowing expert testimony along with other relevant evidence bearing on contemporary community standards does not deny the "special aptitude"[87] of the jury to determine the "mesne,"[88] but rather it provides the jury with a more adequate basis for such determination.

Potential experts, because they could probably aid the jurors in reaching an informed conclusion as to what are the community's contemporary standards of candor and whether or not the challenged material exceeds them, would particularly include sociologists. Also those clergymen and social workers who associate extensively with many segments of the community and are aware of the extent to which questionable material is tolerated should be allowed to testify.[89] Students of American culture could be helpful, especially when the standard applied is a national one. Often having quantitative data to support their positions, distributors of material that is the same as or similar to that challenged could likewise enlighten the jury as to what the public does and does not tolerate in terms of its willingness to purchase. Librarians are likely to have special knowledge which would qualify them as experts. One writer suggests that "men learned in the art"—such as critics, publishers, and professors as to written works, and craftsmen, producers, and reviewers as to movies— because of their closeness to and awareness of the public's acceptance of different

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85 WITKIN, CALIFORNIA EVIDENCE, §§ 411 (2d ed. 1966).

86 See Kalven, *The Metaphysics of the Law of Obscenity*, SUP. CT. REV. 1, 38-39 (1960).

87 See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447 (1957) (Brennan, J., dissenting).

88 See United States v. Kennerley, 209 Fed. 119, 121 (S.D.N.Y. 1913).

89 Clergymen are often admitted as experts on contemporary community standards; see, *e.g.*, People v. Williamson, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734 (1962). Mr. Stanley Fleishman, the defense attorney in that case, justifiably made the point that ministers do not always associate with the community to the extent often assumed, and additionally are often engaged in attempting to suppress material which offends *their church's* standard. Letter from Mr. Stanley Fleishman to Terry Ross, October 21, 1966. Thus, the judge should be particularly cautious in ascertaining that such a person does qualify as an expert, and the jury should be instructed to consider and weigh such evidence objectively.

works in their respective media, would be helpful in determining the issue.[90]

Some of these same persons could be potentially useful on yet another plane in the determination of whether or not the material challenged exceeds contemporary community standards. It is not uncommon for the parties in an obscenity case to bring into evidence material alleged to be similar to that challenged[91]—the defendant to establish that this type of material is commonly tolerated by the community, and the prosecutor or plaintiff to show that this similar material has been adjudged obscene, and thus necessarily in excess of contemporary community standards, in the same or another jurisdiction. It would seem that testimony of the "men learned in the art" could be profitably considered by the jury in its determination of whether the allegedly similar material is actually similar. A sensible position was taken in *United States v. West Coast News Co.*,[92] where the judge held that allegedly similar material was admissible only if a qualified expert established its substantial acceptance in the community and its similarity to the challenged material.[93]

It should be held error or denial of due process where the trial court judge excludes qualified expert testimony or material established as similar.[94] Where the community used as the standard is a national one, as it will be in most cases, the prosecution or plaintiff should be required to submit evidence in addition to the material itself (*e.g.*, expert testimony, similar material adjudicated to be obscene elsewhere) regarding contemporary community standards, in order to sustain its burden of proof. This requirement is necessary because it is doubtful that jurors from a given locality have any idea of what the national community standard is. However, if a local community standard is used, while such additional evidence as expert testimony would be desirable, it should not be required to support a verdict since jurors of the locality fairly can be assumed to have some basis for their determination in their personal knowledge.

"Utterly Without Redeeming Social Importance"

Most cases now allow experts to testify as to the social importance of a challenged work[95] despite the Supreme Court's failure to shed

[90] Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 853 (1964).

[91] See, *e.g.*, United States v. West Coast News Co., 228 F. Supp. 171 (W.D. Mich. 1964).

[92] 228 F. Supp. 171 (W.D. Mich. 1964).

[93] *Id.* at 195.

[94] Smith v. California, 361 U.S. 147, 160 (Frankfurter, J., concurring); *id.* at 169 (Harlan, J., separate opinion). *Accord*, cases cited note 80 *supra*.

[95] See, *e.g.*, Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962).

authoritative light on the question. With the probability great that courts will treat utter lack of social importance as a separate and independent requirement and not just as one factor to be balanced with the other elements of the *Roth* test,[96] defendants can be expected nearly invariably to attempt to justify their material on the ground that it has some social importance, and to call upon experts in the process. The propriety of admitting such testimony cannot be questioned since it is certain that there are specialists in the fields of art, literature, and science who could give aid to almost any juror or judge in determining the worthiness of works in their respective fields.[97] It seems justifiable to repeat here again, though, that merely because an expert has testified that a work has artistic or literary value, and thus supposedly has redeeming social importance, the trier is not bound by that opinion. It is his task to weigh all the evidence, including the expert testimony, and weigh it with regard to his belief in its relevancy and veracity. Certainly, the juror's capacity to determine the question of the material's social importance will be no less than before he heard the experts testify, even if the testimony of different experts conflicts. Failure to admit testimony of the defendant's qualified expert should be held to constitute prejudicial error, but since even in the absence of expert testimony jurors will have grounds in personal experience for judging the material's social importance, the prosecution or plaintiff should not be required to submit expert testimony to support a favorable verdict.

CONCLUSION

The law of obscenity hovers on one side of a "dim and uncertain"[98] line which separates it from the basic freedoms of expression guaranteed and protected by the first amendment. It calls for regulation based upon essentially subjective determinations. The Supreme Court Justices, to achieve even limited consensus of opinion among themselves and to conceal the fact of the inherent impossibility of precisely and objectively defining "obscenity," have cast a judicial fog over it. That fog has naturally extended to cover the question of the expert's role in adjudicating the obscene. Lower courts, left without guidance in independently and usually hastily determining the admissibility of expert evidence, have on occasion failed to give due consideration and articulation to the problem before them.

An attempt has been made to examine closely the elements involved in the adjudication of obscenity, and to address some of the semantical difficulties involved, in an effort to delineate the proper place and purpose of the expert in an obscenity case. It is not suggested

[96] See notes 28-31 *supra* and accompanying text.

[97] See generally Note, 39 N.Y.U.L. REV. 1063 (1964).

[98] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

that the admission of expert testimony is a panacea for all the problems posed by the judicial determination of what is obscene. It is only submitted that such testimony when properly focused and reasonably controlled by the trial court's prudent exercise of judicial discretion—such as limiting the number of experts who may testify and requiring proof of their qualifications as an expert on the matter at hand—will yield results embedded with more informed considerations and will help to insure that the test of obscenity is met in a literal way. In this manner, some degree of certainty might be injected into an otherwise vague field of law.